Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1705

ANABEL J. McCUTCHEON,

Petitioner.

vs.

THE CHICAGO BOARD OF EDUCATION, ET AL.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MICHAEL J. MURRAY,
228 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondent.

THOMAS BROWN,
221 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondent.

WILLIAM J. QUINLAN,
MICHAEL COHEN,
THOMAS BROWN,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

	PAGE
Orders Below	1
Jurisdiction	2
Questions Presented	2
Reasons for Refusing the Writ	2
Conclusion	4

CITATIONS.

Cases.

In Re Master Key Antitrust Litigation, 528 F. 2d 5 (2d Cir. 1975)	3
Katz v. Realty Equities Corp. of N. Y., 521 F. 2d 1354 (2nd Cir. 1975)	3
Levin v. American Export Industries, Inc., 473 F. 2d 1008 (2nd Cir. 1973)	3
National Association for the Advancement of Colored People of Louisiana v. Michot, 480 F. 2d 547 (3rd Cir. 1973)	3
Nolfi v. Chrysler Corp., 324 F. 2d 373 (3rd Cir. 1963)	3
Skiven v. Mesta, 141 F. 2d 668 (10th Cir. 1944)	3
Travelers Indemnity Co. v. Millers Manufacturing Co., 276 F. 2d 955 (6th Cir. 1960)	3
United States v. Chelsea Towers, Inc., 404 F. 2d 329 (3rd Cir. 1968)	3

Treatises.

9 Moore's Federal Practice, par. 110.13(8) at p. 183 (1975) 3

9 Wright and Miller, Federal Practice and Procedure, Section 2386 at p. 275 (1971) 3

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that the requested Writ of Certiorari not issue to review the Orders of the United States Court of Appeals for the Seventh Circuit issued on January 19, 1979 and February 13, 1979.

ORDERS BELOW.

The order of the Court of Appeals dismissing petitioner's appeal is reproduced in Appendix A to the Petition at page 10. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in Appendix B to the Petition at page 13.

JURISDICTION.

Jurisdiction is based on 28 U. S. C. 1254.

QUESTIONS PRESENTED.

Whether the Supreme Court should consider the Seventh Circuit Court of Appeals' order dismissing for lack of jurisdiction the petitioner's interlocutory appeal of the consolidation of related cases by the United States District Court for the Northern District of Illinois.

REASONS FOR REFUSING THE WRIT.

The writ should be denied because the order of the Seventh Circuit Court of Appeals dismissing petitioner's appeal of a consolidation order of the District Court is not a final judgment and does not involve issues of imperative importance nor does the petition set forth any basis in the action of the courts below which entitles her to a writ of certiorari under the standards of Rule 19(b).

The petitioner has misconstrued the action of the United States Court of Appeals in dismissing her appeal from a consolidation order of the United States District Court. The Court of Appeals dismissed petitioner's appeal because of lack of jurisdiction. It held that an order of consolidation is neither included in the categories enumerated under 28 U. S. C. § 1292 giving the Court of Appeals jurisdiction of interlocutory decisions (A. 12), nor a final decision of a district court under 28 U. S. C. § 1291.

The Court of Appeals found it had no jurisdiction of petitioner's purported appeal and never reached the merits of the petitioner's case which is still pending in the District Court on the trial calendar. Thus, the Court of Appeals did not uphold

"unusual actions" of the District Court. It did not deny petitioner a jury trial on her complaint for teacher firing.

Considering this particular issue, Judge Friendly said in his concurring opinion in *Katz* v. *Realty Equities Corp. of N. Y.*, 521 F. 2d 1354 (2nd Circuit 1975):

> "If asked to provide an example of an order that was not a 'final decision' appealable under 28 U. S. C. 1291, one could hardly do better than pick the order [of consolidation] review of which is being sought. The order does not compel or deny anything; * * *"

In agreement are: *Skiven* v. *Mesta,* 141 F. 2d 668 (10th Cir. 1944); *Nolfi* v. *Chrysler Corp.,* 324 F. 2d 373 (3rd Cir. 1963); *United States* v. *Chelsea Towers, Inc.,* 404 F. 2d 329 (3rd Cir. 1968); *National Association for the Advancement of Colored People of Louisiana* v. *Michot,* 480 F. 2d 547 (3rd Cir. 1973); *Travelers Indemnity Co.* v. *Millers Manufacturing Co.,* 276 F. 2d 955 (6th Cir. 1960); *In re Master Key Antitrust Litigation,* 528 F. 2d 5 (2d Cir. 1975); *Levin* v. *American Export Industries, Inc.,* 473 F. 2d 1008 (2d Cir. 1973). Also see: 9 Moore's Federal Practice, par. 110.13(8), at p. 183 (1975) and 9 Wright and Miller, Federal Practice and Procedure, Section 2386 at p. 275 (1971).

The record refutes plaintiff's contention (petition p. 7) that the Court of Appeals decided questions other than that it lacked jurisdiction because there was no final and appealable order.

Respondent submits that the order of the Court of Appeals dismissing petitioner's appeal on the grounds that there is no final and appealable order correctly follows well established law as enumerated in prior federal court decisions. These cases consistently hold that an order of consolidation is not a final and appealable order. Petitioner has cited no contrary case. The Court of Appeals dismissal of petitioner's appeal is therefore not in conflict with the decision of any other Court of Appeals and raises no important issue of law.

The petitioner has also raised the issue of improper assessment of docketing fees by the deputy clerks of the District Court and Court of Appeals. This issue is not a case or controversy involving the respondent.

CONCLUSION.

For the foregoing reasons, the respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL J. MURRAY,
228 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondent.

THOMAS BROWN,
221 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondent.

WILLIAM J. QUINLAN,
MICHAEL COHEN,
THOMAS BROWN,
Of Counsel.